

1 could actually worsen, without policy changes.

2 We suggest several studies that believe
3 will help the Commission to consider both the
4 impact of these policies -- the present policies,
5 that is -- as well as possible remedies.

6 The first is we believe that there needs
7 to be research to establish the impact of
8 deregulation--excuse me--on the loss of
9 minority-related public affairs programming, and
10 the impact of such loss on minority communities.

11 First is the matter of how black and
12 other minority communities are affected by
13 declining numbers of stations under the ownership
14 of those in their own communities. Scholars like
15 Oberholser-Gee and Waldfogel have found that there
16 are higher voting rates in communities where there
17 are ethnically-owned radio stations. Squires
18 found that African-Americans in Chicago trusted
19 information from black-owned stations more than
20 they did those of white ownership. Byerly--
21 myself and two of my colleagues--found similar
22 statements from African-American participants in

1 our research in the Washington, D.C., area.

2 These, my own and other's research
3 --researchers, say -- their participants say that
4 black-owned stations "tell us the truth," they're
5 "more trustworthy," and that "white majority
6 stations don't really understand our issues," and
7 that "reporters only come into our communities
8 when something bad happens."

9 My colleagues and I are concerned about
10 the decline of local news and public affairs
11 programming in broadcast, a phenomenon that the
12 work of Lawrence Redd in 1991 showed is the
13 outgrowth of deregulation.

14 Redd's early work found that the black
15 community, the loss of news and public service
16 announcements lessened the amount of important
17 information about local health, safety, well-being
18 and its availability to black families who use
19 that information.

20 In reconsidering ownership with respect
21 to minorities, we suggest taking Redd's research
22 as a starting point, and commissioning a two-part

1 study that would compare the amount of news and
2 affairs-- public affairs programming before and
3 since the Telecom Act of 1996, and then using
4 those findings to determine the more specific
5 impact on the minority populations today. Such a
6 study would employ a mixed methodology of
7 quantitative analysis and targeted audience
8 research.

9 Number two, we believe there needs to be
10 research to establish clear criteria for
11 determining public interest in relation to
12 minority communities. The matter of defining the
13 "public interest" goes back to 1960, when the FCC
14 adopted a "Report and Statement of Policy
15 regarding Commission En Banc Program Inquiry,"
16 popularly referred to as the "1960 Program Policy
17 Statement." That policy statement included a set
18 of fourteen criteria for determining whether the
19 public interest, necessity and convenience were
20 being served by broadcast stations.

21 The 1960 Statement also concluded that
22 broadcasters should determine the tastes, needs

1 and desires of the community, and design
2 programming to meet those needs. The FCC was thus
3 led to the adoption of formal ascertainment
4 requirements which compelled applicants for
5 broadcast licenses to detail the results of the
6 interviews conducted by the applicant with
7 community leaders.

8 The Commission later abandoned those 14
9 criteria, and then eliminated the requirement,
10 further, that stations even keep program logs and
11 the kind of the information that would be used by
12 community groups to determine whether their issues
13 were being covered.

14 The lack of specific standards, together
15 with the lack of documentation available to
16 stations' performance was worsened by the effects
17 of conglomeration, and the accompaniment -- which
18 accompanied the Telecom Act of 1996.

19 We believe the homogenation of program
20 content which emanates from national and regional
21 headquarters has virtually no concrete way for
22 such content to be evaluated in relation to public

1 interest.

2 We advocate returning to a defined set
3 of standards for "public interest" which arises
4 from the development of markers that measure what
5 the public says it needs for well-being and to
6 meet its own needs.

7 We recommend refining, replicating and
8 updating the study that I did with two of my
9 colleagues, Langmia and Cupid, in 2006, conducted
10 in Washington, D.C., neighborhoods. We believe
11 the study, which was essentially an audience
12 ethnographic study, could be replicated in
13 communities across the country to better determine
14 what people say they need from their local
15 broadcast stations.

16 Number three, we believe there needs to
17 be research to determine market-entry barriers to
18 women's ownership, and ways that gender enters
19 into programming for local community needs and
20 interests. Women's nearly non-existent ownership
21 -- it's hard to tell what that portends for 51
22 percent of the population.

1 Women historically came to own stations
2 through inheritance from their fathers or husbands
3 and through family partnerships. The Form 323
4 filings show that women own approximately 5
5 percent of the television stations, and 6 percent
6 of the radio stations, slightly more than
7 ownership for racial minorities.

8 I should note, as well, that women of
9 color own less than 1 percent of these stations, a
10 frightening statistic, given the approach to
11 population parity between white and non-white
12 people in the nation.

13 It is well-established in the literature
14 that women's programming needs are underserved.
15 Concerned about women's declining ownership in
16 broadcast, I recently undertook a study that will
17 soon be published, in which I surveyed women
18 owners about their experience in ownership, and
19 interviewed an additional group of experts on
20 their assessment of issues in ownership and
21 gender. My research found that women face
22 discrimination in acquiring and operating

1 broadcast stations, what the FCC has framed as
2 "market-entry barriers."

3 As we know, women's ownership is
4 concentrated in rural areas, where they also have
5 difficulties obtaining financing and selling of
6 advertising. These factors virtually assure they
7 will operate with marginal income, and that they
8 will eventually fail or operate on a margin, a
9 very small margin.

10 Women owners actively involved in
11 running their stations, however, describe a strong
12 commitment to community service, to hiring staff
13 with a community orientation. One woman
14 identified her greatest achievement in community
15 service in relation to staying what she called
16 "staying true to her ethnic community." She said,
17 "My common bond is my ethnic Hispanic heritage.
18 There is an energy and passion driven by making a
19 spotcommercial and then seeing that business grow
20 after they have advertised with us."

21 Another woman said, "I have been able to
22 add more educational programs through grants by

1 partnering with non-profit organizations and by
2 adding more ethnic groups to our programming."

3 Recent research by Sandoval cites
4 scholarship showing that minority broadcast owners
5 are very involved in their stations' programming
6 and operations. And, as I noted earlier,
7 communities benefit from such involvement. In the
8 case of minorities, it's been shown that there is
9 a stronger voter turnout, for instance. If women
10 were similarly involved in their stations, the 23
11 owners and 17 experts in my study indicate there
12 may indeed be more programming with women's needs,
13 interests and perspectives in mind.

14 My research suggests a need for further
15 exploration as to how and under what circumstances
16 women's ownership of broadcast stations affects
17 programming content and service to the local
18 community, and whether the FCC should do more to
19 promote local ownership and direct involvement by
20 those female owners in station operations.

21 I look forward to talking to you more
22 about these suggestions.

1 MR. LEWIS: Thank you, Dr. Byerly. Our
2 next panelist is Professor Angela Campbell.

3 Professor Campbell directs the Institute
4 for Public Representation, a public interest law
5 firm and clinical program at Georgetown Law
6 School. She represents non-profit organizations
7 seeking adoption and enforcement of media policies
8 in the public interest in such areas as children's
9 television and advertising, media ownership
10 limits, public interest obligations for broadcast
11 stations, and increasing employment and ownership
12 opportunities for minorities and women in the
13 media. In that capacity, she is very familiar
14 with the members of FCC's Office of General
15 Counsel, including myself.

16 We welcome Professor Campbell.

17 MS. CAMPBELL: Thanks, Jake. I thank
18 the Media Bureau for holding this workshop and for
19 asking some very important questions.
20 Unfortunately, there are not a lot of easy answers
21 here.

22 One of the problems is the paucity of

1 the case law that Len referred to. We only have
2 two cases that directly address the FCC's
3 licensing of broadcast stations. The 1990 Supreme
4 Court decision in Metro Broadcasting in fact
5 upheld two FCC policies that were designed to
6 promote minority ownership. One of these was the
7 consideration of race as one of many factors in
8 the comparative hearing process. And the other
9 was the FCC's distress sale policy, which allowed
10 owners of -- or licensees who had been designated
11 for hearing and were at risk of losing their
12 license to transfer to a qualified minority buyer
13 at a less than fair-market value.

14 The Court applied intermediate scrutiny
15 and found that these policies are constitutional.
16 But, subsequently, in the Adarand decision, the
17 Supreme Court decided that the correct standard
18 for Federal government policies that took into
19 account race was strict scrutiny. Since the Metro
20 Broadcasting Court only evaluated the evidence
21 under intermediate scrutiny, it really just didn't
22 address whether these policies could pass strict

1 scrutiny.

2 Then we have the 1992 decision of the
3 D.C. Circuit in the Lamprecht case. And this was
4 a challenge to the policy of considering gender as
5 one of many factors in awarding new broadcast
6 licenses. And this policy was applied for the
7 first time in the context of a specific
8 comparative hearing, where the FCC decided that
9 women should get some preference, but not as much
10 as minorities if they were going to be working at
11 the station in a management capacity.

12 Again, the Court applied strict
13 scrutiny, and it found that the FCC had failed to
14 establish even a substantial governmental interest
15 in increasing female ownership. But, in fact, the
16 FCC really did not have a factual record. They
17 really hadn't tried to make a factual record.
18 They had just analogized women to minorities. And
19 so they haven't really tried, even though they had
20 the opportunity, on remand, to build a record that
21 would support intermediate scrutiny for women,
22 which, by the way, is still the standard for

1 gender preferences.

2 So neither of these cases really provide
3 much guidance to the Commission as to what's
4 necessary to meet the guarantees of equal
5 protection. And the other cases, which typically
6 involve things like government contracts,
7 employment and university admissions, don't
8 provide much guidance because they arise in such
9 vastly different contexts.

10 So I think the most we can really say
11 about these cases is that we know that strict
12 scrutiny is going to apply where race is a factor,
13 and that intermediate scrutiny will apply where
14 gender is a factor.

15 Now, under strict scrutiny -- and I'm
16 going to focus on that here - the FCC would have
17 to show that the race-based measure serves a
18 "compelling governmental interest" and is
19 "narrowly tailored to achieve that interest."
20 This test can be applied only to specific policies
21 or proposals in the context of the record that's
22 actually developed by the Commission. In other

1 words, you can't just decide these issues in the
2 abstract, whether or not it's going to be
3 constitutional.

4 The FCC has to identify the interest,
5 support that that interest exists, and that their
6 proposal or their policy actually achieves that
7 interest, and that it's narrowly tailored to do
8 so.

9 So I'm going to assume that the FCC -- I
10 believe that the FCC, in fact, could show that
11 there's a compelling governmental interest -- on
12 either grounds of diversity or past
13 discrimination. And I think some of the other
14 panelists are going to address that point in more
15 detail.

16 But I want to make the point that, you
17 know, you have to -- that you really should start
18 -- well, I don't want to say "start," you have to
19 do both, but you want to look at the "narrowly
20 tailoring" side, because even if you have a
21 compelling governmental interest, it still has to
22 be narrowly tailored, and it has to be effective.

1 So, for example, I think that you could
2 argue, under the Grutter case and Metro that
3 diversity is a compelling governmental interest,
4 and you could take race into effect as one of many
5 factors, and that would be perfect for comparative
6 hearings. But we don't have comparative hearings
7 anymore.

8 Okay. So this is one of the problems,
9 is that the FCC actually lacks the authority to
10 reinstate some of the policies that they've used
11 effectively in the past -- preferences in
12 comparative hearings. The other one would be tax
13 certificates. And this is because Congress
14 eliminated comparative hearings for commercial
15 broadcast stations and required auctions in 1997,
16 and they also repealed the tax certificates. And
17 I agree with Commissioner McDowell that Congress
18 ought to, you know, pass legislation on tax
19 certificates.

20 The third measure, the one that --
21 distress sales, which was also upheld by the Metro
22 Court, was modified in 2008 to make it a

1 race-neutral policy. So now the Commission will
2 allow distress sales to any eligible entity as
3 defined under the Small Business Administration's
4 definition of a "small business." And under that
5 definition, for example, a radio station is
6 considered, owner is considered a small business
7 if its annual revenues are less than \$13 million.

8 Now, the FCC also currently has several
9 other race and gender-neutral policies designed to
10 expand opportunities for minorities and women as
11 part of "small businesses and new entrants." And
12 most of these policies do involve some sort of
13 preference for so-called "eligible entities." For
14 example, the Commission allows the sale of
15 grandfathered radio station combinations that
16 exceed local ownership limits to eligible
17 entities. It also allows the holders of
18 construction permits to avoid forfeiting the
19 permit when it's about to expire by selling it to
20 an eligible entity. It has different attribution
21 rules to promote financing for eligible entities.

22 And it also has something called the

1 "failing station solicitation rule" that requires
2 the owner of a failing television station to
3 demonstrate efforts to find an out-of-market buyer
4 before requesting a waiver to sell it to another
5 station in the market. This rule, which was
6 adopted in 1999 and reaffirmed in 2008 -- because
7 the FCC explained that it was necessary to ensure
8 that out-of-market buyers, including qualified
9 minority broadcasters, have notice of an
10 opportunity to bid for a station before it is
11 combined with an in-market station.

12 So, to meet the requirement that
13 race-based measures be narrowly tailored, the FCC
14 has to show that it tried, or at least considered
15 race-neutral solutions and found them
16 insufficient. And clearly the FCC can't do this
17 if it doesn't analyze the effectiveness of its
18 current policies. Yet, to my knowledge, it has
19 never done so.

20 There's two different inquiries that are
21 entailed here. First, whether the policy has
22 resulted in transfers to small businesses or new

1 entrants regardless of race and gender. For
2 example, if no licenses are ever designated for
3 hearing, then there's no opportunity for distress
4 sales, and that's not going to be an effective
5 policy.

6 If they have resulted in sales to
7 eligible entities, then I think the Commission
8 really needs to take the next step and say, "Well,
9 how has that affected minorities and women in
10 particular, given the vast under-representation?"

11 Statistically, it seems unlikely that
12 these current policies will be effective, because
13 the FCC itself admits that 61 percent of radio
14 stations are eligible entities. And of that
15 number, only about 8-1/2 percent are minority
16 controlled -- which is, you know, far below the
17 percentage of minorities in any other relevant
18 comparison you would want to make. And the
19 Commission has not even made such an estimate as
20 to small businesses controlled by women.

21 I guess my final point is that
22 evaluating these policies is difficult without

1 relevant and reliable data. Now, the FCC
2 obviously has a lot of this data. For example,
3 they know when construction permits are
4 transferred, or grandfathered combinations are
5 transferred, but that data is not compiled or made
6 readily available to the public.

7 The Commission did amend its ownership
8 form in 1998 to get -- specifically to get race
9 and gender data, and it was revealed in 2006,
10 through the work of people like Professor Byerly
11 and others, that this data was completely
12 unreliable. So the Commission itself, in 2008,
13 decided to change that process. And yet we still
14 don't have that data. And the deadline for filing
15 that data has been extended repeatedly and now is
16 indefinitely suspended.

17 So, you know, it's very troubling to me
18 that it's taking so long just to get this very
19 basic data that you need to analyze the
20 effectiveness of the current programs.

21 So, in conclusion, you know, I can't
22 (inaudible) that the recent Supreme Court

1 decisions on racial preferences, while -- such as
2 the Seattle Schools case and the New Haven
3 Firefighters case, while they're not on point,
4 they do indicate that it is going to be difficult
5 to convince a majority of the current Justices
6 that race-based preferences are constitutional.

7 But I don't think that this means that
8 the FCC shouldn't try. The FCC really needs to
9 assess the effectiveness of existing policies, and
10 consider other race-neutral proposals. And there
11 are quite a few out there.

12 One of the most important would be to
13 further tighten ownership rules so that there are
14 more stations available and there's less
15 concentration. And I think minorities -- there's
16 lots of evidence that that's going to help
17 minorities. There's also a proposal that the
18 Media Access Project has put forth for using the
19 multi-cast digital spectrum.

20 But, it may be that these can be
21 effective, and that would be wonderful. I would
22 be thrilled.

1 But if they're not, then we'll know
2 that, and then the Commission can think about how
3 they can actually adopt effective race-based
4 policies, and then they'll have the record that
5 would be necessary for a court victory.

6 Thank you.

7 MR. LEWIS: Thank you, Professor
8 Campbell. Our next panelist is Professor Allen
9 Hammond.

10 Professor Hammond holds the Phil and
11 Bobbie Sanfilippo Chair at Santa Clara University.
12 He's been a professor at Santa Clara Law since
13 1998, and he serves as the director of the
14 Broadband Institute of California. He's the
15 former President of the Alliance for Public
16 Technology, the Director of the Law and Public
17 Policy Program at the Center for Science,
18 Technology and Society at Santa Clara University.

19 He's the author of many articles and the
20 editor, with Barbara Cherry and Steven Wildman of
21 Making Universal Service Policy: Enhancing the
22 Process through Multidisciplinary Evaluation.

1 Professor Hammond earned his J.D. from
2 the University Pennsylvania School of Law, and his
3 M.A. from the Annenberg School of Communications
4 at the University of Pennsylvania.

5 Welcome, Professor Hammond.

6 MR. HAMMOND: Thank you. Thank you to
7 the FCC for inviting me this morning, and to the
8 Media Bureau.

9 I'm going to address my remarks to some
10 of the questions that the Commission raised in
11 correspondence with us prior to the workshop. So
12 it will be a little disjointed in that regard.

13 The first question I'm going to address
14 is whether or not there is evidence that
15 non-targeted measures have been insufficient with
16 regard to minority ownership and female ownership.

17 In Off the Dial, which is a female and
18 minority radio station ownership in the United
19 States published by the Free Press, they noted
20 that in 2007, racial and ethnic minorities
21 accounted for 33 percent of the U.S. population.
22 Minorities accounted for 7.7 percent of all

1 full-power commercial radio stations, compared to
2 whites' ownership of commercial radio stations at
3 about 87 percent. Minority ownership of
4 television stations was approximately 3.3.

5 So, by comparison, in other industries
6 such as transportation and health care, minorities
7 own businesses at levels near their proportion in
8 the general population. But at over four times
9 below their proportion of the general population,
10 broadcast station ownership by minorities and
11 women is lower than every sector of the economy
12 tracked by the Census Bureau, except for mining
13 and enterprise management.

14 Thus, current non-targeted measures are
15 insufficient. But we can go back to the FCC's own
16 Policy Statement on minority ownership in 1978,
17 where the FCC concluded that despite its
18 race-neutral efforts to enhance diversity of
19 viewpoint through employment opportunity, and
20 community ascertainment, the views of minority
21 Americans remained inadequately represented in the
22 broadcast media, and that inadequacy adversely

1 affected the American public's right to diversity.

2 So, faced with the documented inadequacy
3 of these minority portrayals and representation in
4 broadcasting, and mindful of the statutory
5 prohibition against censorship, and cognizant of
6 the editorial control vested in broadcast
7 licensees, the FCC implemented the minority
8 ownership policies which we've heard discussed
9 earlier today.

10 Now, does there currently exist
11 sufficient empirical data under these factors? I
12 think Angela Campbell has spoken very eloquently
13 to that, as has Carolyn Byerly. I think the
14 answer is "no" at the present time. And I'd refer
15 you to their remarks.

16 I'm going to go ahead and be a little
17 more optimistic than Angela was with regard to the
18 current constitutional state of the law.

19 Another question was what has been the
20 effect of the decisions in Grutter and Gratz on
21 the Adarand standard?

22 So, as I'm sure everyone in this

1 audience knows, in Adarand the Supreme Court held
2 that the intermediate scrutiny standard for review
3 employed by the Court in Metro was inappropriate,
4 and overruled the Metro Broadcasting decision with
5 regard to the standard. The majority there
6 stated, All racial classifications, imposed by
7 whatever Federal, State or local governmental
8 actor, must be analyzed by a reviewing court under
9 strict scrutiny. In other words, such
10 classifications are constitutional only if they
11 are narrowly tailored measures that further
12 compelling governmental interest.

13 So, to the extent that Metro
14 Broadcasting is inconsistent with that holding, it
15 is overruled.

16 Now, a narrow reading of Adarand
17 regarding the Metro precedent would support a
18 conclusion that only the standard of review was at
19 issue. But, as we know, in Lutheran Church
20 Missouri Synod, the D.C. Circuit Court of Appeals
21 argued that, as a result of the decision in
22 Adarand, the Metro Broadcasting decision was

1 overruled with regard to broadcast diversity being
2 a compelling governmental interest.

3 In this context, the decision in Grutter
4 is of particular importance. Grutter's majority
5 established that diversity is a compelling state
6 interest for purposes of determining the
7 constitutionality of race-based governmental
8 action in the context of equal protection
9 jurisprudence.

10 Now, it's been asked whether or not we
11 can argue that Grutter--under Grutter, that
12 diversity in broadcasting is a compelling state
13 interest under the strict scrutiny standard, and
14 whether or not the Commission could overcome the
15 D.C. Circuit's decision in Lutheran Church that
16 broadcast diversity does not rise to the level of
17 a compelling interest.

18 It also was asked whether or not the
19 Supreme Court's suggestion in Parents Involved
20 that the diversity interest found in Grutter does
21 not extend beyond higher education. So I'm going
22 to take a run at that now.